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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5602

FEODOR FEDORENKO, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF FOR PETITIONER

BRIAN M. GILDEA

CELENTANO & GILDEA
265 Church Street
New Haven, Connecticut 06510

Attorney for Petitioner

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OPINION BELOW

The opinions below (A. 55-119) are reported in 597 F2d 946 and 455 F Supp. 893.

JURISDICTION

The judgment below was entered on June 28, 1979. A rehearing En Banc was denied on August 15, 1979 (A. 121).

Petition for Writ of Certiorari was filed on October 30, 1979, and was granted on February 19, 1980 (A. 122).

The jurisdiction of the Court rests on 28 U.S. Code Sec. 1254(1).

STATUTE INVOLVED

Section 340(a) of the Immigration and Nationality Act, of 1952, as amended (Act), 8 U.S.C. 145 (a), provided in part, as follows:

> "It shall be the duty of the United States Attorneys for the respective districts, upon affidavit showing good cause therefore, to institute proceedings in any Court specified in subsection (a) of Section 310 of this title (Sec. 1421 of 8 U.S.C.) in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willfull misrepresentation..."

QUESTIONS PRESENTED

Whether proof of Materiality as required under 8 U.S.C. § 1451(a) and as set forth in *Chaunt* v. *United States,* 364 U.S. 350, 81S Ct. 147 requires under the se-

cond standard that the Government must prove the existence of ultimate facts which would have warranted denial of citizenship and that disclosure of the suppressed or misstated facts might have led to the discovery of the ultimate facts.

2. Whether under *Chaunt,* the Petitioner's failure to disclose his presence during World War II, at the Treblika Concentration Camp was a fact if known, that was sufficient to divest him of his citizenship.

3. Whether the United States District Courts have equitable powers to consider equitable and mitigating circumstances in a denaturalization proceeding as a basis for its holding and decision to deny naturalization.

STATEMENT OF THE CASE

Petitioner was born in the Ukraine in 1907. On June 23, 1941 he was mobilized into the Russian Army along with the truck he drove for the State. Within three weeks of the date of mobilization, he was captured by the German Army (A.63). After his capture he was transported from the Ukraine to Zytomer, then to Rovno in the Ukraine, then to Chelm, Travnicki, Lublin, Warsaw, Treblinka, bank to Travnicki, Poland, then to Poelitz and to Hamburg, Germany, all during the period of 1941 to 1945 (A. 63, 64, 65, 66, 83 and 84). Through most of this time period the Petitioner was forced to act as a guard under the direction and control of the German Army (A. 89-91).

At the end of the World War II, the Petitioner worked for British Occupation Forces from 1945 to 1949

(A. 84). When the Petitioner registered with the British he listed his birthplace as Sarny, Poland, and his nationality Polish-Ukrainian to avoid repatriation to the Soviet Union (A. 52, 84).

While at the displaced persons camp at Osdorf near Hamburg, the Petitioner applied for immigration to the United States. He stated his birthplace was Sarny, Poland, his occupation a farmer until March 1942, when he was deported to Germany to work at Poelitz (A. 23).

The Petitioner's application for a visa was executed on October 12, 1949 by United States Vice Consul Ralph G. Clark at Wentorf near Hamburg (A. 28, 29). Thereafter, the Petitioner arrived in the United States at Boston, Massachusetts on November 5, 1949.

On November 21, 1950 the Petitioner executed an Application for a Certificate of Arrival and Preliminary Form for a Declaration of Intention, wherein he declared he was born in Sivash, Ukraine (A. 30).

Thereafter, the Petitioner applied for Naturalization on October 4, 1969, and on April 23, 1970 he was issued a Certificate of Naturalization (A. 36).

On August 15, 1977 the United States Government commenced denaturalization proceedings against the Petitioner under 8 United States Code 145 (a) (A. 2-17).

The complaint alleged in Court I that the Petitioner gave false information in his application for Immigration Visa as to his birthplace and places of residence.

Count 2 alleges the Petitioner committed crimes or atrocities against civilians at Treblinka Concentration

Camp in Poland, and he was therefore not a displaced person under the Displaced Person Act, and not eligible for immigration to the United States.

Count 4 alleges the Petitioner willfully failed to disclose the commission of crimes at Treblinka in response to question #6 on Form N-400.

Counts 6 and 7 allege the defendant lacked good moral character required to become a citizen by commission of atrocities at Treblinka and giving false statements with regard to questions #6 and 7 on Form N-400 (A. 5-9).

The case was tried before Judge Norman Roettger in the United States District Court, Southern District of Florida, and the Court issued its decision on July 25, 1978 (A. 55-103), *United States* v. *Fedorenko,* 455 F. Sup. 893 (1978). The Court found the Government did not meet its burden of proof as to all counts of the complaint (A. 95-97).

The District Court further found the Petitioner was a prisoner of the German Army and was forced into involuntary guard duty (A. 65, 89).

The Court did find that the Petitioner lied on his Immigration Application when he gave his birthplace as Sarny, Poland, and stated he worked in a factory in Poelitz, Germany (A. 91).

The District Court held that the misrepresentation was not material as to nationality or birthplace, and would not have denied him citizenship, nor would the disclosure of the facts have been useful in an investiga-

tion leading to the discovery of other facts which might possibly result in a denial of citizenship (A. 92).

The Court then considered the materiality of the Petitioner's misrepresentation of his whereabouts from 1942 to 1945. The District Court found the Petitioner's disclosure of his presence at Poelitz, whether as a forced laborer or a prisoner-guard, would or should have prompted an investigation of records into the Petitioner's background (A. 93).

The Court found the Government failed to show that an inquiry had been made in response to information which would have prompted an inquiry (A. 93).

The District Court specifically held the Petitioner lawfully entered the United States and found for the Petitioner on Counts 1, 2, 3 and 4 (A. 95).

The District Court further held the Government failed to meet its burden of proof as to Counts 6 and 7, and found the Petitioner had not willfully deceived the Government (A. 96).

The Government's witness as to Policy and Procedures of Vice-Consul in administering the Displaced Persons Act was Kempton Jenkins, who served as Vice-Consul in Munich, Germany from March 12, 1951 for about eleven months.

The District Court found numerous inaccuracies in his testimony (A. 89). While the witness' testimony was informative as to the general procedures followed while he was in Germany, it did not establish what policies or procedures were employed at the time the Petitioner applied for his Visa in 1949.

The District Court rejected Mr. Jenkin's definition of Voluntary, and found that the Petitioner did not act in a voluntary way while a prisoner under the German Army (A. 89).

The Government failed to produce as a witness Vice-Consul Ralph G. Clark, who processed the Petitioner's Visa, leaving in doubt many questions as to what occurred in 1949 (A. 95).

The District Court's decision that the Government failed to prove that the concealed facts would have denied Fedorenko citizenship was based on a finding of the following facts:

a. Fedorenko's guard duty was involuntary (A. 65, 89);

b. the testimony of Kempton Jenkins contained inaccuracies, and was, therefore, considered in the light (of) all the evidence (A. 86);

c. Fedorenko lied when he gave his birthplace as Sarny, Poland and stated he worked in a factory in Poelitz, Germany (A. 91);

d. the true facts of Fedorenko's birthplace and nationality would not justify denial of citizenship, and the disclosure of those facts would not have been useful in an investigation leading to discovery of other facts possible warranting denial of citizenship (A. 92);

e. if the Treblinka term had been known to Vice-Consul processing Fedorenko's Visa, it would have-prompted an investigation to determine if Fedorenko

committed atrocities at Treblinka or served voluntarily as a guard (A. 93);

f. the Government did not produce Vice-Consul who processed Fedorenko (A. 95);

g. the Vice-Consul would have to decide whether to admit the applicant, and would give the benefit of the doubt to the applicant, the tendency being to make a favorable judgment (A. 95);

h. the knowledge of Fedorenko being at Poelitz, whether as a forced laborer or a prisoner-guard, would have triggered an inquiry or search of records (A. 95);

i. Fedorenko did not mention Treblinka in his history to the Displaced Persons Commission; he did mention his service at Poelitz; and although the information should have triggered an inquiry, there is no mention of it (A. 93, 95);

j. the doubt as to whether there was an inquiry as to the mention of Poelitz or whether there would have been an inquiry as to it and Treblinka was resolved in favor of the defendant (A. 95);

k. the Court found the Government failed to prove the commission of any crime (A. 96);

l. Fedorenko had strong reason to view himself as a prisoner of war, and not an armed guard for the Germans (A. 96);

m. Fedorenko's good conduct for 29 years is uncontroverted, while the evidence of his conduct at

Treblinka is fraught with conflict and uncertainty, and is inconclusive (A. 97);

n. the Government did not meet its burden of proof as to Counts 1, 2, 3, 4, 5, 6, and 7 (A. 95-97); and

o. the Equities demand that due consideration be given to Fedorenko's 29 years as a responsible citizen, and the inconclusiveness of the record as to his conduct 35 years ago, and that equity requires judgment for Fedorenko (A. 98-103).

The Government appealed the decision of the District Court to the United States Court of Appeals, Fifth Circuit, claiming five questions of error. The Court of Appeals considered only three challenges to the lower Court ruling.

First, the Government asserted that the Petitioner's own admissions indicate his naturalization resulted from material misrepresentations and concealment.

Second, it claims the District Court erred in its rejection of testimony by several survivors of Treblinka.

Third, the Government claims the District Court erred in holding equitable considerations would serve as an alternate basis for its judgment for the defendant (A. 108).

The Court of Appeals, however, did not consider the second challenge which was the District Court's rejection of the testimony of the Treblinka survivors in reversing the decision of the lower court and remanding for directed judgment on behalf of the Government (A. 118).

Thus, the Court of Appeals, Fifth Circuit, decided two questions:

1. Did the Petitioner's naturalization result from material misrepresentations and concealment; and

2. Did the District Court err in holding equitable considerations would serve as an alternative basis for judgment for the Petitioner.

The Court of Appeals first addressed, as an important question, the standard to be applied to the materiality of a misrepresentation by nondisclosures in an action for revocation of citizenship (A. 106). This Court held the District Court erred as a matter of law, and that it is necessary to prove only that facts which the Petitioner misrepresented might, if disclosed, have led to the discovery of other facts which might have resulted in the denial of his citizenship (A. 113).

The Court of Appeals stated the District Court erred as a matter of law as to the standard to be applied to the materiality of a misrepresentation by nondisclosure and further erred in its alternative holding on equitable grounds (A. 106, 118).

The Court of Appeals stated:

> "It was not necessary that the Government prove the existence of facts which, in and of themselves, would have justified denial of citizenship. It is necessary to prove only that the facts which the defendant admittedly misrepresented might, if disclosed, have led to the discovery of other facts which would have justified denial of citizenship." (A. 106).

> ". . . the key to the second test is whether disclosure *would have* led the government to make an inquiry that *might have* resulted in denial of citizenship." (A. 113)(Emphasis Added).

The Court of Appeals reversed the decision of the District Court and remanded that said Court revoke the Petitioner's citizenship.

SUMMARY OF ARGUMENT

The Decision of the District Court for the Southern District of Florida, which is 54 pages, contained within the Appendix, clearly shows that the Court gave careful consideration to all the evidence offered at trial, and applied its findings to the Immigration and Nationality Act, 8 U.S.C. § 1451(a), and the Supreme Court decision in *Chaunt* v. *United States.*

The holding of the District Court was that the Government failed to meet its burden of proof as to either test of materiality set forth in *Chaunt.* The District Court interpreted the *Chaunt* decision as requiring material proof of other facts or ultimate facts under the second test, which would warrant a denial of citizenship.

The Government's appeal was sustained by the Fifth Circuit Court of Appeals on the ground that the District Court's interpretation of *Chaunt* was error as a matter of law, and that the Government need not prove the materiality of the concealed other facts, but only that it was deprived of an opportunity to investigate further concealed facts. In addition, the Appeals Court

held that the Government had met its burden of proof through the testimony of Kempton Jenkins who indicated that had the Petitioner revealed his guard service at the interview, he would have launched an investigation.

Mr. Jenkins acknowledged that the Petitioner's disclosure of service at Poelitz should have triggered the same type of investigation, but apparently did not, and he arrived in Germany one year after the Petitioner's application was approved, and had no knowledge whatsoever as to identity, knowledge, or facts considered by the Vice-Consul who processed the Petitioner's application. The Petitioner argues the Appellate Court erred in its interpretation of *Chaunt*, and erred in finding proof of materiality by accepting the opinion of the expert which was not based on facts or knowledge derived at the time the Petitioner was being processed for Immigration.

The District Court also found as an alternative holding an equitable basis for its decision, a finding which was rejected by the Fifth Circuit Court of Appeals as an error of law.

The District Court decision states that in light of the uncertainty of the Petitioner's conduct 35 years ago, and his 29 years of good citizenship, all doubts, uncertainties and questions which have not been resolved unequivocally should be resolved equitably in favor of the Petitioner. Thus, the District Court considered its equitable powers as authority to find an equitable basis for its holding not inconsistent with its holding that the

Government failed to meet its burden under *Chaunt* (A. 54a, 55a).

Sound reasoning requires that a reading of *Chaunt* when applied to this case imposes upon the Government the burden of proof that requires complete proof of all issues in dispute by clear, convincing and unequivocal testimony; that testimony of an expert which is circumstancial and not based on facts as to his opinions, inferences, or conclusions should be rejected or limited.

Although the alternative holding appears to extend equitable power to the District Court not heretofore determined by any decision of the Supreme Court, there does appear to be sound judicial argument for its application in the present action.

ARGUMENT THE MATERIALITY QUESTION

In both decisions of the Fifth Circuit Court of Appeals and the United States District Court, Southern District of Florida in *United States* v. *Fedorenko,* the materiality test set forth in Immigration and Nationality Act § 340(a), 8 U.S.C. § 1451(a), and as expounded by the United States Supreme Court in the case of *Chaunt* v. *United States,* 1960, 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed. 2d 120, was stated to be ambiguous and interpreted to have different meanings.

The District Court decision interprets the burden of the Government to be equally demanding to both tests under *Chaunt* (A. 91-94). That is to say, the Govern-

ment must establish by clear and convincing evidence that:

1. suppressed facts, if revealed, would warrant denial of citizenship; or

2. their disclosure might have led to other facts which would warrant a denial of citizenship.

Thus, the District Court's decision followed the same interpretation adopted in *United States* v. *Rossi,* 299 F2d 650 (9th Cir. 1962), *LaMadrid & Peraza* v. *Immigration and Naturalization Service,* 492 F2d 1297 (9th Cir. 1974), and *United States* v. *Riela,* 337 F2d 986 (3rd Cir. 1964). Essentially, the District Court held that it is the burden of the Government under both tests to establish by clear and convincing proof that true facts would have warranted a denial of citizenship (A. 94).

The Fifth Circuit Court of Appeals disagreed with the District Court's opinion of the Government's burden of proof, and held that under the second test, the Government need only show the concealed facts, if revealed, *might* have led to an investigation. It further held it was not necessary for the Government to prove that the ultimate facts would have warranted denial of citizenship (A. 106). This interpretation by the Court of Appeals appears to be a reversal of the meaning of the Supreme Court in *Chaunt.*

A. Materiality Standard

The citizenship standard within the meaning of 8 U.S.C. § 1451 (a) was interpreted by the Supreme Court

in *Chaunt* to require proof of the concealment of a material fact or misrepresentation by clear unequivocal and convincing evidence:

"(1) that facts were suppressed which, if known, would have warranted denial of citizenship; or

(2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." 364 U.S. at 355, 81 S.Ct. at 151.

Since the *Chaunt* decision there has been no Supreme Court decision involving the application of a second test or standard, although this important question was raised below in Appellate Court decisions:

In the case of *United States* v. *Rossi,* 299 F2d 650 (9th Cir. 1962) the court considered on appeal whether Rossi, who concealed his true identity by impersonating his brother who was a Chilean citizen, to avoid quota restrictions on Italians, committed a material misrepresentation that should revoke his citizenship. The Ninth Circuit Court's holding was that the Government must prove the existence of ultimate facts which would have justified the denial of citizenship.

In quoting from United States, ex rel. *Fink* v. *Reimer,* 96 F2d 217 (2nd Cir. 1938), the Court in *Rossi* said: A fact suppressed or misstated is not material to an alien's entry *unless* it is one which, if known, would have justified a refusal to issue the visa. Id at 652 (Emphasis Added)

The *Rossi* Court in effect found the Government had not shown that the misrepresentation would have resulted in a denial of an Immigration Visa because the ultimate and underlying fact, the true identity of Rossi, had not been shown to justify denial of citizenship.

Subsequently, in the case of *LaMadrid & Peraza* v. *Immigration and Naturalization Service,* 492 F2d 1297 (9th Cir. 1974), also a deportation case, that Court held a suppressed fact is not material unless the truth would have justified a denial of an Immigration Visa.

In *United States* v. *Riela,* 337 F2d 986 (3rd Cir. 1964), the Court interpreted *Chaunt* to hold that a material false statement results when suppressed facts, if known, would have warranted denial of citizenship.

In *United States* v. *Oddo,* 314 F2d 115 (2nd Cir.) cert. denied, 375 U.S. 833 (1963), it was held that a concealment of an arrest record for such crimes as homicide, assault and robbery denied the Government a means of investigating and discovering the content of the record which was relevant to statutory qualification for citizenship.

In the same Circuit, the Court, in the case of *United States* v. *D'Agostino,* 338 F2d 490 (2nd Cir. 1964), used the exact words of the Supreme Court in *Chaunt,* 364 at 353, when it held that a false statement is sufficiently material if "disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship."

In the Petitioner's case the District Court has followed the *Rossi, LaMadrid & Peraza, Riela* and *D'Agostino* cases as to how the second standard in *Chaunt* is to be applied to the facts of a case.

B. Proof Of Materiality

Proof of materiality must be by "clear, unequivocal and convincing" evidence, and not leave "the issue . . . in doubt." *Chaunt* v. *United States,* id; *Schneiderman* v. *United States,* 320 U.S. 118, 125, 158; *Baumgartner* v. *United States,* 322 U.S. 665, 670.

The District Court found that the Government had failed to prove the misstated and/or undisclosed facts would have warranted a denial of Fedorenko's citizenship (A. 92-94).

Although the defendant had not disclosed his presence at Treblinka and the involuntary service as a guard, the Government failed to prove these undisclosed facts would have prompted the Vice-Consul Ralph Clark to make an investigation. There was no evidence before the Court that the Vice-Consul knew the term Treblinka, and if known, would have responded with an inquiry as to the defendant's status. Furthermore, the Court rejected evidence that had the defendant disclosed his presence at Treblinka as involuntary service, he would have been denied immigration to the United States. In fact, the Court specifically found the defendant acted involuntarily at Treblinka and other locations (A. 89-91). The Court also rejected the opinion of Mr. Jenkins as to the voluntariness of Fedorenko's service as a camp guard (A. 87-89).

The District Court found unpersuasive the Government's claim that had the Petitioner revealed his presence at Treblinka an investigation *would* have ensued since the Petitioner revealed his presence at Poelitz; a term which should have also triggered an investigation, but apparently did not (A. 95).

This finding was very similar to the facts in the *Chaunt* case where the Supreme Court analyzed the materiality of the nondisclosure of an arrest record as compared to Chaunt' disclosure of his membership in an organization which is said to be controlled by the Communist Party. The disclosure of the union membership should have caused an investigation which would have revealed ultimate facts of Chaunt's membership in the Communist Party. The Supreme Court stated 364 at 355, "had that disclosure not been made in the application, failure to report the arrests would have had a greater significance."

Furthermore, the Supreme Court looked into the concealed facts of the arrests and the reasons for the arrests, and concluded the offenses charged were of slight consequence.

If ultimate facts need not be proved, why did the Court examine the ultimate facts beyond the concealed arrests? The answer, I believe, is because the ultimate facts must be materially significant and suffficient to justify denial of citizenship.

The District Court is in accord with the interpretation of *Chaunt,* and applied it directly to the instant

case. Whereas, the Court of Appeals claims this interpretation error and finds that the Government need only establish that an injury *might* result in denial of citizenship (bottom A. 113).

The Appellate Court, in an effort to find a basis for the proof of the second materiality standard, overlooked the District Court's findings, disregarded the Government's failure to produce the Vice-Consul who processed the Petitioner's application one year prior to Mr. Jenkins' arrival in Germany, overlooked the Petitioner's disclosure of service at Poelitz, and found that the Government had proved by clear and convincing evidence "that had the Petitioner disclosed his guard service, the American authorities would have conducted an inquiry that might have resulted in denial of a visa." (A. 117)

The Fifth Circuit Court of Appeals apparently substituted its judgment for that of Judge Roettger as to the weight to be given the Jenkins testimony, in opposition to its ruling in the case of *Vasquez-Mondragon* v. *Immigration and Naturalization Service* 562 F2d 1225 (5th Cir. 1977) wherein it held at page 1226 that it was not "permitted to substitute our judgment for that of the Board or the (Judge) with respect to the credibility of this testimony or the ultimate findings of fact based thereon."

Does not the testimony of Mr. Jenkins have little probative value in the absence of corrobative evidence or direct evidence which would establish the guidelines and the personal knowledge and manner in which the

Vice-Consul at Wentorf processed the Fedorenko Visa that day of October 12, 1949? (A. 39, 40)

The Fifth Circuit Court of Appeals disregarded the weight the District Court gave the testimony of Kempton Jenkins and found facts rejected by the District Court. *United States* v. *Fedorenko,* Id. 952, 953. (A.116)

In *United States* v. *Oddo,* 314 F2d 117, the Second Circuit Court said:

"Testimony as to custom and practice is admissable as circumstantial evidence, subject to the usual condition that its probative value outweighs any possible impact."

As the Fifth Circuit Court of Appeals noted in a 1974 decision of *Stanall* v. *McKenzie Tank Lines, Inc.,* (5th Cir. 1974), 497 F2d 529, "An expert must be in possesion of sufficient proved facts to enable him to express a reasonable accurate conclusion, and the facts upon which he bases his opinion must be disclosed . . ."The testimony of Kempton Jenkins was based on hearsay or speculation, and lacked a proper basis. His experiences and knowledge were acquired after the fact. Jenkins was not present in Germany at the time the Petitioner's application was approved, did not know the Vice-Consul who had processed the application, and had no knowledge of Treblinka (A. 39, 40).

Also, the Court of Appeals seems to hold that the Government's burden under the second *Chaunt* test is

less demanding and would permit denaturalization where the first test could not be met.

The Court of Appeals did not consider any of the alleged naturalization application misrepresentations as a basis for its reversal.

The Appellate Court overlooked the disclosure of service at Poelitz, which, according to the Government's witness, Jenkins, would have triggered an inquiry (A. 95), and although there is no proof that an inquiry was made, as a result of that disclosure, the Court nevertheless, finds that had the Petitioner disclosed his guard service, the American authorities would have conducted an inquiry (A. 117).

This is analagous to *Chaunt,* where the nondisclosed facts of an arrest record were claimed to deprive the Government of the opportunity to investigate further, when it also appeared that disclosed facts of union membership which should have prompted an inquiry, failed to do so. The Appellate Court's finding is contradicted by the fact that no apparent inquiry was made when it should have been as a result of the Petitioner's disclosure of his service at Poelitz.

AN EQUITABLE BASIS FOR THE DECISION

In addition to the District Court's ruling that the Government had failed under the *Chaunt* test to meet its

burden of proof, there was an alternative basis for the holding of the Court.

The Court ruled that the District Court could give equitable consideration in the denial of the Government's cause of action.

The Court held that since a denaturalization proceeding is an equitable proceeding "equity demands the weighing of the rights of the parties in light of all the circumstances in order to arrive at a decision which is fair and just." (A. 98)

The question of whether the District Court has discretion to consider the equities as an alternative basis for its holding in denying denaturalization was reviewed on appeal by the Fifth Circuit Court of Apeals, and rejected as error distinquishing the Court's authority to grant citizenship and its authority to revoke citizenship (A. 118).

The question is one of first impressions for the Supreme Court.

It is well recognized that a denaturalization proceeding is an equitable proceeding which does not afford a Constitutional guarantee of trial by jury. Also, the District Courts have consistently exercised equitable discretion in granting citizenship. *Wadman* v. *Immigration and Naturalization Service,* 329 F2d 812, 817 (9th Cir. 1964)

The District Court held that justice requires consideration of mitigating and equitable circumstances in a

denaturalization case, within certain limits of its discretion (A. 102, 103).

In the case of *In Re: Iwanenko,* 145 F. Supp. 838 (N.D. Ill. 1958), the court considered the petitioner's fear of forced repatriation as an equitable and mitigating circumstance to justify her misrepresentation of her place of birth.

There is no question that a denaturalization proceeding is a suit in equity. *Knauer* v. *United States,* 328 U.S. 654. The District Court concluded that "if discretion may be exercised in a petitioner's favor in naturalization cases where the burden rests on petitioner, then surely the court can consider equitable and mitigating circumstances in a denaturalization case where doubts are to be resolved reasonably in favor of the citizen." (A. 102).

Thus, the District Court considered the circumstances surrounding the Petitioner throughout World War II and up to the present time. The harship of the time, and the Petitioner's good record as to his conduct over the past twenty-nine years should, where doubts exist, preponderate in favor of the Petitioner. Reasonable bounds of discretion to consider the equities would not, as the Appellate Court fears, lead to an abuse of the law and a circumventing of the qualification requirements for citizenship. The courts should recognize that there may be equitable and mitigating circumstances that require consideration in applying the letter of the law when it involves the revocation of

citizenship and the resulting losses suffered by the defendant.

The commencement of denaturalization proceedings many years after the alleged occurrence in a foreign country often results in the impoverishment of the defendant, and his inability to obtain witnesses and documents in defense of the charges. Should an outstanding citizenship record be overlooked or considered where reasonable doubts exist as to proof of the allegation presented?

CONCLUSION

The judgment below should be reversed, and the case remanded to the Court of Appeals, Fifth Circuit, to affirm the judgment of the District Court.

Respectfully submitted,

/s/ BRIAN M. GILDEA

Brian M. Gildea
265 Church Street
New Haven,
Connecticut 06510

Attorney for the Petitioner